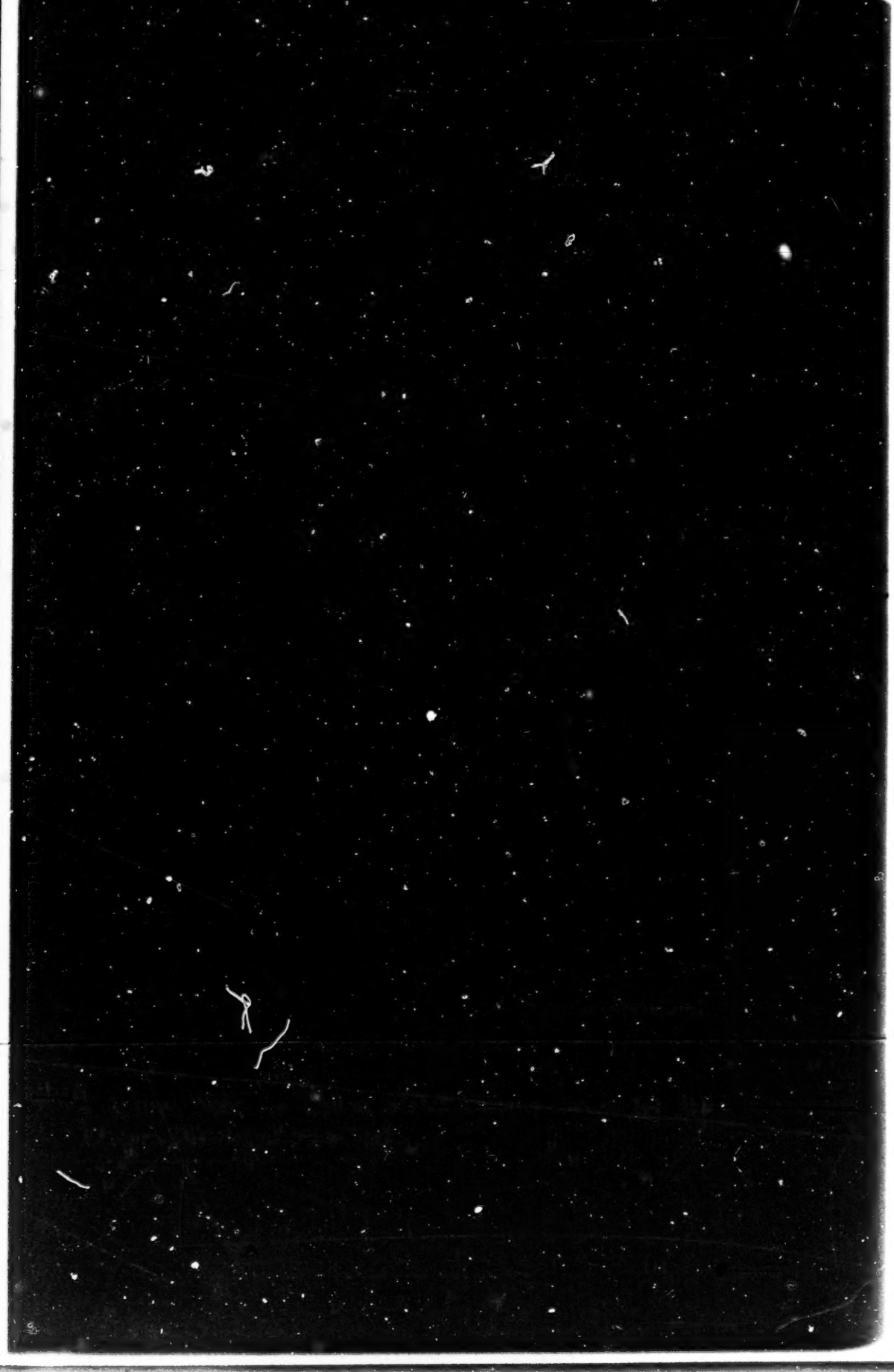


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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~897~~ 70-29

JOHN GIGLIO,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAMES M. LA ROSSA
115 Broadway
New York, New York 10006
Counsel for Petitioner

October 23, 1970

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No.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, John Giglio, prays that a Writ of Certiorari issue to review the judgment entered on September 23, 1970, by the United States Court of Appeals for the Second Circuit in the proceeding entitled United States of America, Appellee vs. John Giglio, Defendant-Appellant, Docket No. 34973.

Opinions Below

The judgment of the District Court was affirmed by the Court of Appeals for the Second Circuit in open Court with no opinion. The judgment of the Court of Appeals appears in the Appendix at p. A1.

Jurisdiction

The judgment of the Court of Appeals was entered on September 23, 1970. The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1254(1).

Questions Presented

1. Is newly discovered evidence of a prosecutor's promise of immunity to the Government's main witness, where the fact of that promise had been suppressed, sufficient basis for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure?

2. Is a promise of immunity made by an Assistant United States Attorney attributable to the United States Attorney?

Statutory Provisions

Rule 33 of the Federal Rules of Criminal Procedure.

Rule 33. New Trial

The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any

other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period. As amended Feb. 28, 1966, eff. July 1, 1966.

Constitutional Provision Involved

Constitution of the United States, Amendment V

No person shall . . . be deprived of life, liberty, or property, without due process of law. . .

Statement of the Case

The Petitioner, John Giglio, was convicted in the United States District Court for the Eastern District of New York of two counts of violation of Title 18, United States Code, Sections 2314 and 2 and one count of conspiracy in violation of Title 18, United States Code, Section 371. The Petitioner appealed that judgment of conviction in the United States Court of Appeals for the Second Circuit wherein that conviction was affirmed. With respect to that decision of the Circuit Court, no Petition for Certiorari was filed. Subsequent to that decision Petitioner filed a Motion for a new trial based on newly discovered evidence. The District Court denied Petitioner's Motion and this Order was affirmed by the Circuit Court. The facts which underlie the question herein presented relate to certain promises made to the Government's main witness, the existence of which were discovered subsequent to the time when the Petitioner had filed his original Brief on Appeal.

Robert Taliento, the only Government witness to inculpate the Petitioner, testified that he had received no promise of immunity from prosecution in return for the testimony which he gave. At page 78 of the record in the United States Court of Appeals for the Second Circuit, Taliento's testimony was as follows:

> "Q. Did anybody tell you at any time that if you implicated somebody else in this case that you yourself would not be prosecuted? A. Nobody told me I wouldn't be prosecuted.
>
> Q. They told you you might not be prosecuted? A. I believe I still could be prosecuted.
>
> Q. You were told, were you not, that you could be prosecuted in this case, is that correct? A. Yes.
>
> Q. Were you told that you would not be prosecuted if you testified against somebody else? A. Not that I wouldn't be prosecuted.
>
> Q. What were you told?
>
> Mr. Golden: Objection, Your Honor.
>
> The Court: The objection will be overruled.
>
> The Witness: Can you repeat the question? (The last question was read by the reporter)
>
> A. That there is still a chance I could be prosecuted."

The net effect of this testimony was that there was absolutely and unequivocally no promise that the witness would not be prosecuted if he cooperated with the Government. This assertion is further compounded by the Assistant United States Attorney's reference to it in his closing argument to the jury. In summation the Government attorney flatly stated that

> "He (Taliento) received no promises that he would not be indicted".

Where the question of credibility was so important an issue, the jury, through the testimony of the witness and

the summation of the prosecutor, was led to believe that Taliento received no assurances that he would not be prosecuted. While it is true that the jury could have drawn inferences from the fact that the witness had not yet been indicted, there was no substantive proof that Taliento had any ulterior motive for testifying.

The newly discovered evidence which the Petitioner relied upon in bringing his motion for a new trial in the District Court, was disclosure of the fact that there was an express promise made to Taliento that he would not be prosecuted if he agreed to become a witness against Giglio. Discovery of this fact was made subsequent to the time when the Petitioner had originally filed his Brief on Appeal. Petitioner's counsel was advised by Assistant United States Attorney Anthony DiPaola, who was originally assigned to prosecute the matter, that on September 20, 1966, he had expressly promised Taliento that if Taliento testified before the Grand Jury against the Petitioner, he (Taliento) would not be indicted. This information was affirmed by Mr. DiPaola in an affidavit which he submitted to the District Court (A-32)* Mr. DiPaola's affidavit reads in part as follows:

> "It was further agreed and understood that he, ROBERT EDWARD TALIENTO, would sign a waiver of immunity from prosecution before the Grand Jury, and that if he eventually testified as a witness for the Government at the trial of the defendant, JOHN GIGLIO, he would not be prosecuted."

Assistant United States Attorney DiPaola, although originally in charge of the Giglio file, was not the Assistant

---

* "A" refers to the Appendix in United States Court of Appeals for the Second Circuit.

United States Attorney who eventually tried the case. The question which was presented to the Court of Appeals, therefore, was twofold. First, was the United States Attorney, in his position as trial counsel for the Government, responsible for the promises made by the Assistant United States Attorney who originally had charge of the prosecution? The second issue was whether Taliento's perjurious testimony that he had not been promised immunity was sufficient basis for a new trial, where the existence of that promise was discovered subsequent to the initial trial.

Reasons for Granting the Writ

The decision below directly conflicts with the due process principles enunciated in this Court's ruling in *Napue* and *Brady*.

This Petition presents a significant question concerning the application of the doctrine of *Napue* v. *State of Illinois*, 360 U.S. 264 (1959) and *Brady* v. *Maryland*, 373 U.S. 83 (1963) in Federal Criminal Prosecutions.

As early as 1935, this Court held in *Mooney* v. *Holohan*, 294 U.S. 103 (1935), that a prosecuting attorney was under a Constitutional duty to disclose evidence which was beneficial to the defendant's case. There it was held that a conviction obtained through the use of knowingly false and perjured testimony cannot be permitted to stand. In *Napue (supra)*, this Court extended the above stated rule when presented with a factual pattern unmistakeably similar to the case at bar. The *Napue* case stands for the proposition that a defendant's Constitutional right to due process is also denied when false testimony relates to the credibility of the witness rather than the substance of the testimony.

Four years later, this Court held in *Brady* that due process forbids the Government to "withhold . . . evidence favorable to an accused upon request . . . where that evidence is material to either guilt or punishment". (373 U.S. at p. 87) Thus, under the *Brady* rule, evidence under the control of the Government which is "material" and "favorable" to an accused's defense must be divulged.

In the case at bar, there is no question about the fact that such material did, in fact, exist. The affidavit of Assistant United States Attorney DiPaola leaves no question but that a promise was made that the principal witness would not be prosecuted in return for his testimony. The trial transcript leaves little doubt but that this information was not divulged to the defense. The question presented to this Court, therefore, is whether the failure of the Government to divulge such information is sufficient basis for a new trial.

The Second Circuit Court of Appeals in *United States v. Polisi*, 416 F. 2d 573, (2nd Cir., 1969) presented what appeared to be a clear application of standards with respect to a new trial where prosecutorial misconduct was involved. In *Polisi*, which involved the Government's failure to reveal a conflicting statement made by the defendant's accomplice, the Court stated that the general rules with respect to the granting of a new trial, do not apply

> ". . . where the prosecutor has suppressed evidence exculpatory of or otherwise favorable to the accused." (577)

The Circuit Court further states that this rule is applicable even where the issue involves only the credibility of a witness and not the facts at issue citing *Napue (supra)*. The

Court, by applying the principles set forth in *Brady*, reached the conclusion that a defendant is entitled to a new trial even where the suppressed evidence would probably not have caused a different verdict and even though the primary effect would only be to impeach the credibility of the witnesses.

The decision of the Circuit Court of Appeals in the case at bar casts a shadow of uncertainty regarding standards with respect to a motion for a new trial based on newly discovered evidence. The fact that the District Court's Order denying Petitioner's Motion for a new trial was affirmed without opinion creates even more far reaching difficulties. Does the Petitioner's bid for a new trial fail in terms of *Napue, Brady* and *Polisi*? Or is it that the promise made by the Assistant United States Attorney who originally had charge of the file is not binding on the Government? The latter proposition, it is respectfully submitted, is untenable. The fact that the proper categorization of the problem is left to speculation, dramatizes the necessity for this Court to review this issue which is of such pragmatic and fundamental importance to the proper administration of criminal justice. Can it be the rule of our Federal Courts that the prosecutorial team as a whole is not bound by representations of a member of that team who apparently had the authority to make such representations?

Although this Court has never directly spoken to this issue, various decisions of our lower courts have made it clear that a prosecutor cannot disavow representations made by other members of the prosecutorial team.

In an often quoted decision, *Application of Kapatos*, 208 F. Supp. 883 (S.D.N.Y. 1962), Judge Palmieri stated

> "... I do not think that an accused's right as defined by Napue should depend on the fortuitous circumstance that the District Attorney who conducts the investigation also conducts the prosecution, ..."

In the instant case there is no issue as to whether Taliento was a central witness; he was, in fact, the only witness to inculpate the Petitioner. Nor is there a question under *Napue* of whether his false testimony was significant. In *Hawkins* v. *United States*, 324 F. 2nd 873 (5th Cir., 1963) the Court was faced with a similar problem. An Assistant United States Attorney who allegedly made promises of leniency to Government witnesses in consideration for their testimony, was not the Assistant who later tried the case at the trial in issue. The Circuit Court found that

> "At the time these witnesses so testified the Government must be charged with knowledge that their testimony was false."

There are several other decisions, both on the Circuit and District Court levels which support the position taken by the Court in *Kapatos* and *Hawkins* (*supra*). See *Barbee* v. *Maryland*, 331 F. 2d 842 (4th Cir., 1964); *Nash* v. *Purdy*, 283 F. Supp. 837 (S.D. Fla. 1968); *Walker* v. *Bishop*, 295 F. Supp. 767 (E.D. Ark. 1967).

It is respectfully submitted that the decision below runs contrary to the current view of fundamental fairness in criminal prosecutions under the due process clause of the Fifth Amendment. There can be no question but that the disclosure of the promise made by Assistant United States Attorney DiPaola would have been both favorable and material to the defense. Where the question of the witness's

credibility was so important an issue, this evidence would undoubtedly have had a dramatic impact upon the jury.

To paraphrase this Court's language in *Brady*, society must share the Petitioner's awful loss, because the system of justice imposed upon him was fundamentally unfair.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted

James M. La Rossa
115 Broadway
New York, New York 10006
Counsel for Petitioner

October 23, 1970

APPENDIX

Judgment of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of September one thousand nine hundred and seventy.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. ROBERT P. ANDERSON,

HON. WILFRED FEINBERG,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOHN GIGLIO,
Defendant-Appellant.

Appendix—Judgment of United States Court of Appeals for the Second Circuit

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. Daniel Fusaro
Clerk